IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.1068 OF 1997

Rally Brothers & Convey. ... Petitioners.
V/s.
M/s.Swadeshi Mills Co.Ltd. ... Respondent.

WITH
COMPANY PETITION NO.17 OF 1998

M/s.Associated Engineers. ... Petitioners.
V/s.
M/s.Swadeshi Mills Co.Ltd. ... Respondent.

WITH
COMPANY PETITION NO.316 OF 2001

Bank of Baroda. ... Petitioners.
V/s.
M/s.Swadeshi Mills Co.Ltd. ... Respondent.

WITH
COMPANY PETITION NO.1187 OF 2001

Nine-Chem (India) ... Petitioners.
V/s.
M/s.Swadeshi Mills Co.Ltd. ... Respondent.

WITH
COMPANY PETITION NO.217 OF 2002

H.K.Dye-Chem Corpn. ... Petitioners.
V/s.
M/s.Swadeshi Mills Co.Ltd. ... Respondent.

WITH
COMPANY PETITION NO.385 OF 2002

B.I.F.R. ... Petitioners.
V/s.
M/s.Swadeshi Mills Co.Ltd. ... Respondent.

.....

Mr.Pradeep Nayak i/b. Federal & Rashmikant
for the petitioners (in C.P.No.1068/97)

Mr.Mihir Kamdar i/b. Udawadia Udeshi & Co.
for the respondent.

Mr.B.K.Bali i/b. Thakkar & Bali
for the petitioner (in C.P.No.316/01)

Ms.N.D.Buch with Ms.B.B.Dholakia for
RMMS, Intervener Union (C.P.No.316/01)

Mr.H.C.Mehta for the petitioner (in C.P.No.1187/01)

Mr.Rajiv Gawde i/b. K.Ashar & Co. for IDBI.

Mr.A.A.Kumbhakoni, Associate Advocate General
with Ms.Geeta Shastri, A.G.P. for the
High Power Committee.

Ms.Dipti Nazareth i/b. Prakash Janik & Co.
for the petitioner (in C.P.No.217/02)

CORAM : A.M.KHANWILKAR, J.

DATED : 5th September 2005.

P.C. :

. Heard learned counsel for the parties. Mr.Mihir Kamdar i/b. Uday Wadia Udeshi & Co. has waived notice for the Respondent Company in all these petition.

2. This order will dispose of the above-numbered petitions including Company Petition No.385 of 2002, which is not notified on the board, for, it was heard along with the above-numbered petitions. The said petition (C.P.385 of 2002) emanates from the recommendation made by the Board of Industrial and Financial Reconstruction (B.I.F.R.) vide order dated 5th February 2001 recording its prima-facie opinion that the respondent company was not likely to make its net worth exceed its accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof was not likely to become viable in future; For

which reason it was just and equitable and in public interest to wind up the said company under section 20(1) of the Sick Industrial Companies (Special Provisions) Act.

3. The said recommendation was registered as B.I.F.R. Case No.50/1998 against the respondent company and was formally admitted by this Court's order dated 13th February 2002. On the same day, another company petition came to be admitted by this Court being Company Petition No.1068/1997 filed by M/s.Ralli Brothers & Convey for passing order of winding up of respondent company and to appoint Official Liquidator with all powers under the provisions of the Companies Act, 1956.

4. In so far as Company Petition No.1068/1997 is concerned, it arises on account of non-payment of dues receivable by the said petitioner in respect of admitted and acknowledged liability by the respondent company. An award was passed against the respondent company under which the company was liable to pay US dollars 40,937.40 to the said petitioner. The said amount was not paid. Accordingly, the said petitioner filed Company Petition No.1068/1997 after giving statutory notice. Initially, the respondent company agreed to pay the amount by filing consent terms dated 25th March

1998. Under the said consent terms respondent company acknowledged its liability to pay sum of Rs.28 lakh to the petitioner. However, the respondent company failed to pay the amount as specified in the consent terms. Later on, supplementary consent terms were recorded between the petitioner in Company Petition No.1068/1997 and the respondent company, on 5th March 1999. Even the payment under the supplementary consent terms was not made to the petitioner, as a result of which, this Court proceeded to admit the company petition on 13th February 2002.

5. It is not necessary to advert to the facts of the other company petitions for the simple reason that, if the recommendation of B.I.F.R. of winding up of the respondent company is to be accepted and if that order is to be passed, the other petitions will have to be disposed of with liberty to the respective petitioners to submit their claims before the Official Liquidator which, in turn, will be considered in accordance with law.

6. There is no dispute that the respondent company has closed down its business and manufacturing activities long back. The counsel appearing for the respondent company concedes this position. It is a matter of record that, during the

pendency of the above petitions in this Court, a provisional Liquidator was appointed with all powers. Besides, the State of Maharashtra constituted the High Power Committee consisting of Chief Secretary (Labour) as Chairman of the said committee; and the representative of the workers; representative of I.D.B.I. (secured creditor); representative of Bank of Baroda (secured creditor); Chairman of Swadeshi Mills; and Deputy Secretary (Labour) were nominated as members of the said committee. The Deputy Secretary (Labour) was nominated as Member Secretary under the communication dated 28th September 2001. The said High Power Committee was constituted to take steps to facilitate disposal of the assets of the respondent company.

7. Be that as it may, the respondent company had filed an application before this Court being Company Application (Ldg.) No.489/2002 for the following reliefs:

a. The High Power Committee appointed by the Government of Maharashtra as per the letter dated 28th September, 2001 and annexed as Annexure "A" to the Affidavit in support of this Judge's Summons be appointed as Committee authorised and directed to sell the assets of the Company and to deposit the sale proceeds thereof with this Hon'ble Court.

b. The High Power Committee be directed to

call a meeting of the creditors and the workers of the Company to formulate a scheme for distribution of the amounts recovered after sale of the assets as per the provisions of the Companies Act, 1956 and to submit the same to this Hon'ble Court for further directions,

. The said application was disposed of by order dated 21st June 2002, which reads thus:

". Leave under Rule 19(3) of the Company Code Rules, 1959 granted to the applicant/ petitioner to take out a judges Summons in terms of the Draft Judges Summons handed in. Judges Summons made forthwith.

2. By consent, heard forthwith.

3. After hearing the parties and considering the documents on record and the various orders, the ends of justice would be met if the High Power Committee, appointed by the Government of Maharashtra is empowered except the assets which are the subject matter of Appeal No.804 of 2001 presently pending before the Appellate Bench of this Court.

4. <u>This order will be subject matter to</u> the order passed in the said Appeal <u>or any further order to be passed</u>. In the light of that, the following order:

i) Company Application made absolute in terms of prayer clause (a).

ii) The High Committee, on disposal of the assets and realisation of the proceeds to deposit the same with the official liquidator.

iii) The Official Liquidator thereafter to the same according to law after filling the claims and hearing the parties.

iv) The High Power Committee

to submit a report initially on or before 1st October, 2002.

v) Official Liquidator take possession of the assets to enable the High Power Committee to dispose of the same." (emphasis supplied)

. By this order the High Power Committee was authorised to take steps to sell the movable assets being plant and machinery belonging to the respondent company. It is not in dispute that on the basis of this order the High Power Committee proceeded to dispose of the plant and machinery of the respondent company, which have been sold to M/s.Bhavna Enterprises being the highest bidder, for a sum of Rs.15,53,45,217/- (Rupees Fifteen Crores Fifty-three Lakhs Forty-five Thousand Two Hundred Seventeen), which amount is inclusive of interest. In that sense, now the respondent Company has no plant and machinery. As mentioned earlier, the business activities of the respondent company have been stopped long back. Further, the B.I.F.R. has already recorded its prima-facie opinion that the company was not likely to make its net worth exceed its accumulated losses within a reasonable time while meeting all the financial obligations and the company has become unviable. This position has not changed in any manner; rather by the sale of plant and machinery, the company is not in a position to

carry on its business activities hereafter. Taking overall view of the matter and as the prayer for winding up of the respondent company is not resisted by one, I have no hesitation in allowing the company petition arising from the recommendation made by the B.I.F.R. as well as other company petition filed by the unsecured creditor (C.P.1068 of 1997) for recovery of acknowledged dues on the ground that the company is unable to pay its debts.

8. Accordingly, I proceed to order that the respondent company be wound up under the orders and supervision of this Court. The provisional Liquidator appointed by this Court, by virtue of section 450(4) of the Act, would act as Official Liquidator with full powers. This order also disposes of companion company petitions already on board with liberty to the respective petitioners to submit their claims to the Official Liquidator, which will be considered in accordance with law.

9. There is one more question which will have to be resolved in the present petitions. The counsel for the workmen as well as for the company contend that as the High Power Committee has been appointed by the State Government to deal with the assets of the company, the said committee be permitted to "independently" continue with steps to

be taken for disposal of immovable assets of the company which are the only properties available for disposal in relation to the respondent company. It was argued that it was not necessary for the said High Power Committee to revert back or report to the Official Liquidator or the Court or for that matter to seek confirmation of sale of immovable assets from the Court as was the course adopted in the past relating to sale of movable assets. It is not possible to accept this submission. For, in law, once the order of winding up of a Company is passed, it would follow that the Official Liquidator is required to take over the custody of the assets of the concerned company and proceed to deal with the same in accordance with law. There is no other mechanism envisaged by the Companies Act. The Official Liquidator has to then take necessary steps and comply with all the formalities such as referred to in sections 448 to 463 of the Act.

10. Suffice it to observe that because of the Legislative mandate, the High Power Committee, constituted by the State Government though, cannot be allowed to proceed "independently". Indubitably, once an order of winding up of a company is passed the same operates in favour of all the creditors and the contributories of the company as if it had been made on the joint petition of a creditor and of a

contributory. Further, by virtue of Section 536(2), any disposition of the property (including actionable claims) of the Company, and any transfer of shares in company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Court otherwise orders, be void. The date of commencement of winding up will have to be reckoned at the time of the presentation of the Petition for the winding up, as provided in Section 441(2) of the Act. Accordingly, all such transfers or dispositions ought to be placed before the Company Court for its approval or confirmation to get it validated. Moreover, it is well established position that the Court is the custodian of the interests of the Company and its creditors and the sanction of the Court required under the Companies Act has to be exercised with judicial discretion regard being had to the interests of the company and its creditors as well. In A.Subbaraya Mudaliar v. K.Sundararajan (AIR 1951 Mad. 986), observation wherein has been approved by the Apex Court in Navalkha & Sons vs. Ramanya Das [(1969) 3 SCC 537], it is held that the condition of confirmation of sale by the Court is a safeguard against the property being sold at an inadequate price; it will be not only proper "but necessary" that the Court in exercising the discretion which it undoubtedly has of accepting or

refusing the highest bid at the auction held in pursuance of its orders, should see that the price fetched at the auction is an adequate price "even though there is no suggestion of irregularity or fraud". In LICA (P) Ltd. vs. Official Liquidator [(1996) 85 Company Cases 792 (SC)], it has been held that proper control of the proceedings and meaningful intervention by the Court would prevent the formation of a syndicate, underbidding and the resultant sale of property for an inadequate price. The abovesaid decisions are referred to and relied on in the case of Divya Manufacturing Company (P) Ltd. vs. Union Bank of India 2000 (6) SCC 69). Thus understood, it is not possible to accede to the submission made on behalf of the workmen and the Company that the High Power Committee be permitted to "independently" proceed with the sale of left over immovable assets of the Company that too without approaching the Court for confirmation of sale thereof.

11. To get over this position, Counsel for the workmen and Company relied on the order passed on 21st June 2002, which is reproduced in its entirety in the foregoing paragraph and the subsequent orders passed on 5th June 2003 and 11th September 2003 as well as 17th September 2003, which were passed in continuation of order dated 21st June 2002 while

conducting sale in respect of moveable assets of the Company to contend that similar procedure can be adopted in respect of sale of immovable assets of the Company. This submission overlooks that the order dated 21st June 2002 clearly provided that the arrangement referred to therein was subject to any further order to be passed. That was an interim arrangement arrived at during the pendency of the Company Petitions. Indeed, provisional liquidator was already appointed by this Court on 13th February 2002. However, now that the Company Petitions are finally disposed of by this order, the arrangement which was arrived at at the interim stage, cannot bind me or preclude me from directing the sale of immovable assets of the Company to be completed "in accordance with law". The interim arrangement during the pendency of the Company Petitions, was necessitated because the same pertained to movable assets of the Company which was plant and machinery, so as to realise the proper value thereof, lest, because of efflux of time, the same would have been required to be sold as scrap material. As mentioned earlier, in view of the legislative mandate and the duty of the Court spelt out in catena of decisions, it is not possible to accept the suggestion that the High Power Committee be permitted to sell even the immovable assets independently or without seeking confirmation of sale from the Court. It is relevant

to mention at this stage that after the sale of moveable assets of the Company, the claim of the workmen has been substantially satisfied out of the sale proceeds thereof. The outstanding claim of the workmen will be fully secured out of the sale proceeds of immovable assets of the Company, which is likely to be substantial one and in multiples of the value of the movables. In that sense, there is no reason for any apprehension to be entertained by the workmen.

. Counsel for the Company relying on the amended provision - Section 448 of the Act, amended by Companies (Second Amendment) Act, 2002 - would contend that it is open to the Court to appoint person other than the Official Liquidator attached to the Bombay High court as the Official Liquidator in relation to the Company in liquidation. This submission is canvassed on the erroneous assumption that the amended provision Section 448 as amended by the amending Act of 2002 has come into force. That is not so. For, the Central Government is yet to issue notification in terms of Section 1(2) of the Act of 2002 so as to bring the amended provisions in force. Whereas, under the extant provision section 448, the Official Liquidator appointed by the Central Government attached to the Bombay High Court, who is a whole-time officer, will have to be

appointed as a consequence of the order of winding up.

12. Mr.Kumbhakoni, Associate Advocate General appearing for the High Power Committee has, therefore, not toed the abovesaid line of argument canvassed by the workmen and the company. He, however, submits that the movable properties of the company have been disposed of by the said committee and the procedure followed by the committee was placed before this Court in derivative proceedings. This Court was satisfied about the procedure adopted by the High Power Committee and only thereafter, the sale of movable assets (plant and machinery) of the respondent company, in favour of M/s.Bhavna Enterprises, was allowed to be completed. Mr.Kumbhakoni submits that even with regard to the immovable assets of the respondent company the said High Power Committee be allowed to take necessary steps but only as "agent" of the Official Liquidator. That submission is made relying on section 457(2)(v) of the Act which allows the Liquidator, in a winding up company, to appoint an agent to do any business which the Liquidator is unable to do himself. In the present case the Official Liquidator has not come forward with such application. However, Mr.Kumbhakoni, submits that even so, in the interest of all concerned, the High

Power Committee appointed by the State Government be permitted to act as agent of the Official Liquidator and that all the ministerial steps be taken by the said committee under the instructions of the Official Liquidator and whenever necessary, appropriate orders will be obtained from this Court. In other words, it is submitted that to facilitate expeditious disposal of the immovable properties of the respondent company, which is now directed to be wound up by this order, the High Power Committee be allowed to function as "agent" of the Official Liquidator to complete the ministerial formalities. This request is supported by the counsel for the petitioners. Even the counsel for the workmen as well as Counsel for the company now supports this request made by Mr.Kumbhakoni on behalf of High Power Committee. In the peculiar fact situation of the present case, the said request is accepted on condition that the High Power Committee will periodically report to the Official Liquidator about the steps taken by it and shall comply with all directions to be given by the Official Liquidator from time to time. No policy decision shall be taken by the High Power Committee. Mr.Kumbhakoni assures that the High Power Committee shall take steps as per the schedule provided under this order to ensure that sale of immovable properties of the respondent company is completed within a reasonable

time. That assurance is accepted.

. Accordingly, following directions are issued for the present:

(i) The High Power Committee will complete the ministerial formalities preceding the issuance of advertisement for sale of immovable properties of the respondent company and submit report thereof to the Official Liquidator within three weeks;

(ii) On receipt of such report, the Official Liquidator shall require the High Power Committee to issue advertisement regarding public auction in two local newspapers having wide circulation, one in English and another in vernacular language in Mumbai, Delhi, Chennai, Kolkatta, Hyderabad, Ahmedabad and Bangalore respectively. The advertisement shall be issued in the name of the Official Liquidator, High court, Mumbai.

(iii) All communications to be sent by the High Power Committee in respect of sale of immovable properties of the respondent

company shall clearly state that the same is sent as "agent" of the Official Liquidator, High Court, Mumbai. Copy of every communication sent by the High Power Committee be marked to the Official Liquidator for his information.

(iv) The advertisement regarding sale shall be issued within three weeks from the date of submission of report by the High Power Committee. The advertisement shall provide last date of inviting tenders at least two weeks from the date of last advertisement published. After expiry of last date of receiving tenders, on the following working day, the tenders shall be opened in the presence of Official Liquidator at the specified time and place. The offerors may be permitted to raise their bid at the said auction, if they so desire. The Official Liquidator would then submit his report to this Court within a period not exceeding one week therefrom for confirmation of the sale.

13. Mr.Kumbhakoni submits that this arrangement would subserve the interest of all concerned and the steps referred to above will be observed by all the

concerned.

14. It is made clear that the sale of immovable assets of the respondent company will be on "as is where is and whatever there is basis" and on usual terms and conditions.

15. In case of any logistical problem encountered either by the Official Liquidator or the High Power Committee it will be open to apply to this Court for appropriate directions.

16. The High Power Committee shall inform the petitioners herein about any meeting or about any development. That communication be sent to the Advocates appearing for the respective petitioners before this Court.

17. All the petitions stand disposed of in terms of this order.

A.M.KHANWILKAR, J.